85-756

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DORIS ADAMS,

Petitioner,

—v.—

GRAINGER W. McILHANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Respondent, a state district judge, summarily ordered plaintiff jailed for contempt of court four months after she wrote him a private letter criticizing him and his treatment of her sons in a criminal case.

1. In light of respondent's total disregard of the jurisdictional prerequisites for contempt proceedings under Texas law, did not respondent act in the "clear absence of all jurisdiction," thereby precluding him from gaining judicial immunity under §1983?

2. Even if the plaintiff's claim for damages were barred by absolute judicial immunity, may not plaintiff nonetheless seek injunctive and/or declaratory relief against the defendant for his blatantly unconstitutional actions, if she has alleged and can demonstrate: (a) a reasonable possibility that she may be the victim of similar illegal action by the defendant judge

in the future, and/or (b) that the defendant judge's unconstitutional conduct is capable of repetition yet otherwise will evade review.

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DORIS ADAMS,

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GRAINGER W. McILHANY,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 27, 1985, Petition for Rehearing En Banc denied August 2, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in Adams v. McIlhany, 764 F.2d 294 (5th Cir. 1985), and is attached hereto as Appendix A. The decision of the district court is reported in Adams v. McIlhany, 593 F.Supp. 1025 (N.D. Tex. 1984), and is attached, together with the judgment entered in the cause, as Appendix B.

JURISDICTION

The judgment of the Court of Appeals, entered on June 27, 1985, is attached as Appendix C. On August 2, 1985, the Court of Appeals denied Petitioner's Petition for Rehearing En Banc (Appendix D). This petition for writ of certiorari is filed within ninety days after that denial. This Court's jurisdiction is invoked under 28 U.S.C §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to

> the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Art. 1911a, Tex.Rev.Civ.Stat.Ann., provides in pertinent part:

> A court possesses inherently all powers necessary for the exercise of its jurisdiction and enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in the aid of its jurisdiction...A court has the power to punish for contempt.

STATEMENT OF THE CASE

Petitioner Doris Adams is a resident of Miami, Texas, located in Roberts County. The Respondent, Judge Grainger McIlhany, presides over the 31st Judicial District of Texas, encompassing a large portion of the Texas Panhandle, including Roberts County.

Mrs. Adams was approximately 50 years of age and was employed as a waitress in Miami at the time of this incident. She has five

children, including three sons. During the months of May and June of 1983, all three of Mrs. Adams's sons had criminal charges pending against them in Judge McIlhany's court. (R 66-77)

During that period, Mrs. Adams and Judge McIlhany engaged in an exchange of correspondence concerning her sons' criminal cases. On May 23 and June 8, 1983, Mrs. Adams sent Judge McIlhany two strongly worded letters that were highly critical of the treatment her sons had received from the law enforcement authorities in Roberts County, including Judge McIlhany himself. (R 50-52)

Judge McIlhany chose to respond personally to Mrs. Adams's letters. On June 10, 1983, McIlhany wrote Mrs. Adams, tersely acknowledging receipt of her letters and stating, with respect to her sons: "I regret that they have not seen fit to reform to society." (R 53)

On June 14, 1983, Mrs. Adams responded by adding her own handwritten comments to the bottom and back of Judge McIlhany's June 10 letter and mailing it back to him. (R 53-55) Mrs. Adams's June 14 letter (which is set forth in full in the District Court's opinion) again was highly critical of the system of justice in Roberts County. The letter included the statement that:

> The only way you can win with the law any more is if you can buy your way out & its (sic) done every day. You know I can't pay so you stick my boys good.

At the time Mrs. Adams wrote her letter on June 14, there were still criminal cases pending against two of her sons. The criminal cases were all concluded in July, 1983. (R 66-77)

All of Mrs. Adams's letters to Judge McIlhany were private correspondence. None of the letters was ever filed of record or published by Mrs. Adams.

In July of 1983, Mrs. Adams was informed by the attorney for one of her sons that Judge McIlhany was upset by her June 14 letter. At a hearing before Judge McIlhany in one of her sons' cases, Mrs. Adams attempted to apologize to him for any offense her letter might have caused, but McIlhany told her that her apology was "not good enough." (R 90)

Mrs. Adams had no further correspondence or contact with Judge McIlhany until the afternoon of October 5, 1983, when she was served at her home with an "Order to Show Cause." (R 95) The order directed Mrs. Adams to appear in the 31st District Courtroom at 9:00 a.m. on October 7, less than two days later, "to show cause why you should not be held in contempt of court for sending a letter postmarked June 14, 1983, to Grainger W. McIlhany, Presiding Judge of the 31st District Court of Roberts County, in

which you state that the Judge is paid off by defendants." (R 102)

When Mrs. Adams appeared in court on October 7 in response to the summons, Judge McIlhany was presiding. No sworn complaint of any kind had been filed against Mrs. Adams. She did not have an attorney. Judge McIlhany did not inform her that she had a right to an attorney or ask whether she could afford one. In fact, he failed to inform Mrs. Adams of any of her rights as a defendant in an alleged criminal contempt proceeding.

Instead, he commenced the "hearing" by stating to Mrs. Adams only that she had been served with papers to appear in court to "show why you are not in contempt of court for the letter that you wrote me, postmarked June 14, 1983, in which you indicate that I have been dishonest and this is your opportunity to give your defenses to this

matter." (R 107) He did not advise her of the elements of a contempt offense, of the burden of proof, of her right not to testify, or of her right to call other witnesses in her behalf.

When Mrs. Adams attempted to explain her letter, Judge McIlhany abruptly had her sworn as a witness. Then, for the first time, Judge McIlhany read to Mrs. Adams the specific language from her June 14 letter (set forth above) which he claimed constituted contempt of court. He then instructed her to "present our (sic) case." (R 108)

Mrs. Adams attempted to explain that the comments in her letter referred only to her own inability to afford counsel for her sons and not to any dishonesty on the Judge's part. (R 108) She emphasized that the letter was not intended to be disrespectful, stating that she "did not mean any offense

towards you at all because I always thought you were real great." (R 109) But Judge McIlhany refused to accept her explanation and found that "You are accusing the court of dishonest conduct and that is a contempt of court." He ordered her placed immediately in the Roberts County Jail for a period of thirty days, and terminated the hearing. When Mrs. Adams asked if there were "any other way I could work it out," he simply said, "No ma'am." (R 109) He did not advise her of her right to appeal or to seek relief by a petition for writ of habeas corpus; he simply ordered the Sheriff to take her into custody immediately. (R 109)

An "Order of Commitment" was signed by Judge McIlhany the same day, October 7, 1983; it stated that he found Mrs. Adams to be in contempt of court because she was "unable to explain her conduct to the court." She was ordered to be confined for 30 days and to pay

court costs. (R 102)

Mrs. Adams remained in confinement in the Roberts County Jail for a period of 28 days, when McIlhany finally directed her release.

Petitioner, now represented by counsel, brought this suit against Judge McIlhany under 42 U.S.C. §1983 for depriving her of rights secured to her under the Constitution and federal and state laws, including the right to counsel and to due process of law in the alleged contempt proceeding. Petitioner's complaint states claims for damages as well as declaratory and injunctive relief.

Respondent filed a Rule 12(b)(6) motion construed by the district court as a motion for summary judgment. The sole basis for the motion was that Judge McIlhany possessed absolute judicial immunity as a matter of law. Petitioner asked the court to hold the

motion in abeyance, so that Petitioner could conduct some discovery. After Petitioner gave notice of her intent to depose the defendant (R 154), Respondent successfully petitioned the court to stay discovery. (R 174) Shortly thereafter, the District Court rendered summary judgment in Respondent's favor and dismissed all of Petitioner's claims, relying on the doctrine of absolute judicial immunity.

The Fifth Circuit affirmed. Applying a four-part test it had earlier articulated in the case of McAlester v. Brown, 469 F.2d 1280 (5th Cir. 1972), the court decided that Respondent's actions were "judicial acts" for immunity purposes. Adams v. McIlhany, 764 F.2d 295, 298 (5th Cir. 1985).

The Fifth Circuit then considered whether such acts had been performed "in the clear absence of all jurisdiction." Despite a long line of authority establishing that

Judge McIlhany's actions were not only unconstitutional, but clearly violated requirements that the Texas Supreme Court has expressly held are absolute prerequisites to the exercise of jurisdiction in a constructive contempt case, the Fifth Circuit held that Judge McIlhany had "sufficient jurisdiction" to be entitled to absolute immunity merely because he was "empowered to cite for contempt." Id. at 299.

Finally, the court of appeals upheld the district court's dismissal of the claims for injunctive and declaratory relief on the ground that Petitioner had no "standing" because there was no longer any "live controversy" existing between the parties. Id.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Erred in Determining that Judge McIlhany Did Not Act in the Clear Absence of All Jurisdiction

Even if all Respondent's actions were

"judicial acts," he is not entitled to absolute immunity if he acted "in the clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) citing Bradley v. Fisher, 13 Wall. 335, 351 (1872).

In addressing this issue, the Fifth Circuit stated the jurisdictional test as follows: "Where a court has some subject matter jurisdiction, there is sufficient jurisdiction for immunity purposes." Adams, 764 F.2d at 298. In the Fifth Circuit's view -- a view disputed by other circuits as we show below -- apparently the mere fact that Respondent's court was one of general jurisdiction and statutorily empowered to cite for contempt was fully dispositive of the immunity question. See Art. 1911a, Tex. Rev.Civ.Stat.Ann.

In reaching its conclusion, however, the Fifth Circuit flatly ignored longstanding Texas case law establishing that Respondent

acted in the clear absence of jurisdictional prerequisites to valid constructive contempt proceedings.

First, it is well established in Texas that a failure to comply with the requirements of due process deprives the court of any authority to adjudicate a constructive contempt case. These due process requirements have long been recognized and Judge McIlhany most certainly was charged with knowledge of them.

Some sixty years ago, in Cooke v. United States, 267 U.S. 577 (1925), a case which arose in Texas, this Court held that the writing of a derogatory letter to a judge accusing him of personal bias constituted at most a constructive contempt. The Court held that the summary trial and punishment of the alleged contemnor was constitutionally impermissible; due process required that the accused be presumed innocent, that he be

advised of the charges and have the opportunity to defend against them, and that he be afforded the right of counsel, the right of confrontation, and the right to call witnesses on his behalf. Id. at 537.

In Mayberry v. Pennsylvania, 400 U.S. 455 (1971) this Court further held that when contempt proceedings are based on alleged personal attacks on a judge, due process requires that the contempt proceedings take place before an impartial tribunal, i.e., "a judge other than the one reviled by the contemnor." Id. at 466; see also Bloom v. Illinois, 391 U.S. 194 (1968); Codispoti v. Pennsylvania, 418 U.S. 506 (1974); Sandstrom v. Butterworth, 738 F.2d 1200, 1209-12 (11th Cir. 1984), cert. denied, 105 S.Ct. 787 (1985).

Texas has repeatedly emphasized and expanded upon the due process requirements in contempt proceedings. See, e.g., Ex Parte

Landry, 144 S.W.2d 962 (Tex.Crim.App. 1912) (affidavit setting forth all material facts and elements of alleged criminal contempt is essential prerequisite to contempt prosecution; judge may not issue show cause order sua sponte); Ex Parte Turner, 478 S.W.2d 256 (Tex.Civ.App. -- Houston [1st Dist.] 1972, no writ) (due process requires sworn complaint setting forth facts); Ex Parte Barnett, 600 S.W.2d 252 (Tex. 1980) (written judgment of contempt prior to commitment to jail is essential to due process; commitment order standing alone is void); Ex Parte Hiester, 572 S.W.2d 300 (Tex. 1978) (alleged contemnor was denied due process and assistance of counsel when contempt proceeding was held in absence of his attorney, who was in trial in another court); Ex Parte Cragg, 109 S.W.2d 479 (Tex. 1937) (burden of proof for contempt is "beyond a reasonable doubt").

A Texas judge who proceeds to imprison a person for alleged constructive contempt in disregard of these fundamental prerequisites acts not only unconstitutionally, but in the complete absence of all jurisdiction. The Texas cases make it clear that the question is not merely one of constitutionality, but of judicial power. The summary or unconstitutional exercise of a court's contempt power in a constructive contempt case is a jurisdictional defect which renders the contempt conviction and commitment order void. See, in addition to the cases cited above, Ex Parte Duncan, 95 S.W.2d 675, 680 (Tex. 1936); Ex Parte Ratliff, 3 S.W.2d 406, 407 (Tex. 1928) (constructive contempt conviction without notice and an opportunity to be heard "is a nullity"); Ex Parte Hardin, 344 S.W.2d 152, 153 (Tex. 1961) (courts are "without authority" to summarily punish for constructive contempt); Ex Parte Hill, 52

S.W.2d 367, 368 (Tex. 1932) (summary constructive contempt judgment is "void on its face"); Ex Parte Gordon, 584 S.W.2d 686, 688 (Tex. 1979) (contempt judgment rendered against alleged constructive contemnor without "full and complete notification" is a nullity).

Moreover, even if it were relevant that Respondent, despite his blatant disregard of constitutional and state-law requirements, had a general jurisdiction extending to punishment for contempt, it is clear that he acted in the clear absence of any and all personal jurisdiction over Petitioner. The Texas courts have explicitly held it to be a jurisdictional requirement that a constructive contempt proceeding be commenced by the filing and service of a sworn complaint setting forth the alleged contemptuous facts. Ex Parte Landry, 144 S.W.2d at 966; Ex Parte Turner, 478 S.W.2d at

257.

The Circuits disagree on the question whether, in order to establish a successful claim of absolute judicial immunity, a judge must possess "some" personal, as well as subject matter jurisdiction. The Fifth Circuit has not addressed the issue directly, although in the present case it appears the court believed that only "some" subject-matter jurisdiction was sufficient. Adams, 764 F.2d at 298.

The Second Circuit has explicitly held that a judge who acts in the absence of personal jurisdiction does not thereby bring himself within the "clear absence" exception to immunity if he nonetheless possesses subject- matter jurisdiction. Green v. Maraio, 722 F.2d 1013, 1017 (2d Cir. 1983).

But the Ninth and Eleventh Circuits have taken the opposite view. In Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980), cert.

denied sub nom. Zeller v. Howard, 451 U.S. 939 (1981) the court stated:

> Because the limits of personal jurisdiction constrain judicial authority, acts taken in the absence of personal jurisdiction do not fall within the scope of legitimate decisionmaking that judicial immunity is designed to protect. ... We conclude that a judge who acts in the clear and complete absence of personal jurisdiction loses his judicial immunity.

Id. at 849. The Eleventh Circuit explicitly adopted the analysis of Rankin in its opinion in Dykes v. Hoseman, 743 F.2d 1488 (11th Cir. 1984).

The scope of the exception recognized in Rankin concededly may be narrow. The judge must know that he lacks all personal jurisdiction over the person concerned, or else act "in the face of clearly valid statutes or case law expressly depriving him of jurisdiction..." Rankin, 633 F.2d at 849.

Even under this strict standard, it is clear that Judge McIlhany lacked any

jurisdiction over the person of Mrs. Adams. Certainly Judge McIlhany, presuming his familiarity with the clearly-established Texas case law, knew he had no jurisdiction to arrest, try, or punish Mrs. Adams for constructive contempt in the absence of a sworn complaint stating the facts alleged to constitute contempt. At the very least, Respondent was charged with knowledge of such Texas law.

In summary, Judge McIlhany lacked both personal and subject-matter jurisdiction. His actions violated clearly established Texas case law expressly depriving him of jurisdiction in the contempt proceeding: (1) when he ordered Mrs. Adams arrested pursuant to an ex parte show cause order which was unsupported by any sworn complaint; (2) when he initiated and conducted the alleged contempt trial in total disregard of Petitioner's First, Fifth, Sixth, and

Fourteenth Amendment rights; and (3) when he ordered her jailed for thirty days despite the absence of any sworn testimony to support a judgment for contempt, and despite the non-existence of a written judgment to support his commitment order.

This Court should resolve the split in the circuits, reverse the judgments below and hold that Respondent is not entitled to absolute immunity as a matter of law under the facts of this case.

2. The Court of Appeals Erred in Holding that Petitioner Lacked Standing to Seek Injunctive or Declaratory Relief

The district court expressly recognized that Respondent's judicial immunity, if it exists, is not a barrier to an award of declaratory and injunctive relief (and accompanying attorneys' fees, under 42 U.S.C. §1988). This Court has clearly held that the judicial immunity doctrine "is not a bar to prospective injunctive relief against a

judicial officer acting in her judicial capacity." Pulliam v. Allen, 104 S.Ct. 1970, 1981 (1984). Nonetheless, both the district court and the court of appeals summarily dismissed the claims for injunctive relief in the present case because in their opinion there was no longer any "live controversy" between the parties. Adams, 764 F.2d at 299. The reliance of both decisions on Juidice v. Vail, 430 U.S. 327 (1977) in support of their conclusion that Petitioner lacked standing to pursue her equitable remedies, is inexplicable in light of Pulliam v. Allen, where, on the basis of past (and completed) unlawful incarceration a defendant who alleged likely repetition was held entitled to seek prospective relief.

Even on its own terms, Juidice v. Vail provides Judge McIlhany no support. First, plaintiffs in that case sought only injunctive relief. They were not before the

court seeking damages of any kind. Lacking an actual injury, plaintiffs' standing in Juidice rested only on a highly speculative chance of future injury resting on a lengthy chain of contingencies. Because the complaint failed to allege the possibility of future harm, the Court held that plaintiffs lacked standing.

Petitioner, in contrast, has suffered actual injury. An allegation of "threatened or actual injury" is sufficient for standing purposes. O'Shea v. Littleton, 414 U.S. 488, 493 (1974), citing Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). Certainly, given the grievous nature of the abuse of Mrs. Adams's constitutional rights, she has demonstrated sufficient "personal stake in the outcome of the controversy" to insure that there exists the requisite "concrete adverseness" in this case. Baker v. Carr, 369 U.S. 186, 204 (1962).

Furthermore, unlike the plaintiffs in Juidice, but precisely as did the plaintiff in Pulliam, Petitioner has alleged a threat of likely future harm. Mrs. Adams has specifically pleaded that Respondent has threatened her and other persons with contempt in the process of indulging his personal vindictiveness. The district court's order staying discovery effectively prevented Mrs. Adams from fleshing out the facts necessary to establish that her situation is not an isolated one, and that, absent an injunction, Judge McIlhany may continue to deprive her (and other alleged contemnors) of their constitutional rights.

Moreover, this case is a paradigmatic example of a harm "capable of repetition yet evading review." Mrs. Adams was wholly unaware of her right to challenge Judge McIlhany's actions by writ of habeas corpus because Respondent never advised her of her

rights, and in fact told her there was "no other way" she could contest his order of commitment besides serving the thirty days in jail. As things stand now, Respondent may continue to abuse the constitutional rights of future alleged contemnors, knowing his acts are effectively insulated from challenge or review so long as alleged contemnors are kept ignorant of their rights at trial, and effectively deprived of access to counsel, as was Petitioner during her unlawful incarceration.

This situation is also distinguishable from that in City of Los Angeles v. Lyons, 103 S.Ct. 1660 (1983), involving a request for an injunction against the unwarranted and apparently purely arbitrary use of police "chokeholds" on criminal suspects. There this Court rejected Lyons's argument that the lack of standing for injunctive relief resulted in his claim evading review, because

his §1983 claim for damages remained to be litigated. Id. at 1669. Here, in contrast, Petitioner's claim for damages may well be barred by virtue of Respondent's asserted judicial immunity from damages liability. Moreover, although a lengthy chain of contingencies stood between Lyons and future harm, here Petitioner will likely be jailed again if she exercises her First Amendment right to send Judge McIlhany a letter complaining of the administration of justice in Roberts County.

The present case is also distinguishable from DeFunis v. Odegaard, 416 U.S. 312 (1974), where the court held that the capable-of-repetition doctrine generally applied only where plaintiff could make a reasonable showing that he would again be subjected to the alleged illegality. Plaintiff in DeFunis could not make such a showing; the Petitioner here, on the other

hand, has alleged that there is a likelihood that she will be subject to Judge McIlhany's unconstitutional practice. More importantly, the majority in DeFunis emphasized the likelihood that other litigants, presumably law students injured by defendant's allegedly unconstitutional conduct, would bring suit in the future, assuring review. Id. at 319. That will not happen here because, as previously noted, it is not Judge McIlhany's policy to advise alleged contemnors of their rights of appeal or habeas corpus.

The Fifth Circuit's view on standing is flatly inconsistent with Pulliam, where the question of standing to seek relief was fully briefed and necessarily -- if implicitly -- resolved by the Court. The Pulliam plaintiffs were no more capable of showing a likelihood of future harm from the defendant's illegal practice than can Petitioner in the present case. Indeed, in

the vast majority of cases involving judicial immunity, it is arguably "unlikely" that any plaintiff will be a future victim of the defendant's illegal acts. For Pulliam to have any future effectiveness, this Court should reject expressly the narrow view of standing which the Fifth Circuit has here adopted.

Assuming Petitioner has standing, there is no question of the propriety of declaratory or injunctive relief here. Such relief is particularly appropriate in a case where the doctrine of judicial immunity may well operate to bar any relief at law.

Another factor supporting the award of declaratory or injunctive relief is the fact that a decision refusing any relief in this case may have a chilling effect on the First Amendment rights of Petitioner and others dealing with Judge McIlhany in the future. Mrs. Adams resides in a sparsely populated,

rural county, over which Respondent is the sole presiding district judge. It is nearly inevitable that Mrs. Adams, along with many other members of her community, will at some point or another have dealings with Judge McIlhany. The willingness of these individuals to exercise their constitutional right to freedom of expression in any dealings with Respondent cannot help but be adversely affected by a decision leaving unconstrained Judge McIlhany's summary exercise of his assumed contempt powers whenever he deems some expression of criticism personally offensive. The chilling effect on Petitioner's and others' First Amendment rights that would result from a complete denial of redress demonstrates such "irreparable harm" as will justify the award of injunctive relief. See Allee v. Medrano, 416 U.S. 802, 810-11 (1974); cf. New York Times v. Sullivan, 376 U.S. 254 (1964).

The district court's principal explanation for denying equitable relief to Mrs. Adams, i.e. the "difficulty in this case of fashioning appropriate relief without infringing upon the proper exercise of the contempt power in the future" (R 188), is particularly unpersuasive. The injunctive relief which Petitioner seeks in this case would in no way interfere with Judge McIlhany's discretion to determine what constitutes contempt of court, nor would an injunction infringe upon the proper exercise of his contempt power in the future. In Pulliam, the injunctive order in question enjoined a Virginia state judge from the unconstitutional practice of incarcerating persons arrested for non-jailable offenses if they could not meet bail. This Court said:

> [T]here is no merit to the dissenter's insistence that the scope of the injunctive order entered here illustrates the threat to judicial independence inherent in allowing injunctive relief

> against judges. ... ...No judgment calls are required in following the court order that petitioner no longer impose bond for offenses for which no incarceration is authorized by statute.

104 S.Ct. at 1981 n.22.

Similarly, no "judgment call" would be required of Judge McIlhany to comply with an injunction which simply ordered him to abide by the long-established requirements of due process in constructive contempt cases. The precise contours of such an injunctive order can be determined when the facts are fully developed.

The rationale for permitting injunctive relief against a state judge under §1983 applies here with equal or greater force with respect to declaratory relief. In Pulliam v. Allen, the Court indicated that declaratory relief against a state judge is also proper under §1983. 104 S.Ct. at 1972.

At the very least, Mrs. Adams is entitled to a declaration that Judge McIlhany

abused his judicial authority and violated her most fundamental constitutional rights. Even if a damages remedy is not available to make Mrs. Adams whole for the grievous wrong done to her, and injunctive relief is denied, she ought at least be accorded the dignity of a declaratory judgment to establish the vindication of her rights as a United States citizen.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Honorable Court grant this petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

DORIS ADAMS, Plaintiff-Appellant,

v.

GRAINGER W. McILHANY, Individually and as Presiding Judge of the 31st Judicial District of Texas, Defendant-Appellee.

No. 84-1827.

United States Court of Appeals, Fifth Circuit.

June 27, 1985.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, POLITZ and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Doris Adams, the mother of three men tried before Texas Judge Grainger W. McIlhany, brought suit against the judge under 42 U.S.C. § 1983 after McIlhany sentenced her to thirty days in jail for contempt. The contempt arose from a letter Adams sent McIlhany four months previously intimating that he had dealt harshly with her

sons because they could not afford to bribe him. Adams' sons were not required to spend time in prison.

This case is an appeal from a dismissal on summary judgment. Because we find there is no genuine issue of material facts under which the appellant, Adams, may avoid the appellee's judicial immunity, we affirm the dismissal of the damages action. Moreover, finding no case or controversy which might warrant injunctive or declaratory relief, we also affirm the dismissal of Adams' claims for injunctive and declaratory relief.

I

Fed.R.Civ.P. 56(c) provides for the reviewing of motions for summary judgment; in pertinent part the rule reads:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

> entitled to judgment as a matter of law...

The burden is on the moving party to establish that there is no genuine issue of fact and the party opposing the motion should be given the benefit of every reasonable inference in his favor. State of Pennsylvania v. Curtiss National Bank of Miami Springs, 427 F.2d 395, 400 (5th Cir. 1970).

Accordingly, on appeal we view all materials in the light most favorable to the appellant, Adams, to determine if there is any issue of material fact. If no such issue exists, we must then determine if the appellee is entitled to judgment as a matter of law. Id.

II.

Doris Adams brought this suit for damages and declaratory and injunctive relief against Grainger McIlhany, the Presiding Judge of the 31st Judicial District of Texas,

after McIlhany ordered Adams imprisoned for thirty days for contempt of court. This dispute had its genesis in May and June of 1983, during which time Adams' three sons were facing criminal charges in McIlhany's court. Adams wrote to McIlhany twice, first on May 23, and then on June 8, complaining about the treatment her sons were receiving. She asserted that McIlhany and others were harassing her sons and that others got away with crimes either because of connections or bribes.

On June 10, McIlhany wrote to Adams. He stated, "I received your letters regarding your sons. I regret that they have not seen fit to reform to society."

Adams responded by writing on McIlhany's letter and sending it back to him. She complained again that her sons were being harassed. She also stated, "The only way you can win with the law any more is if you can

buy your way out & its done every day. You know I can't pay so you stick my boys good." The envelope was postmarked June 14. At that time charges remained pending against two of Adams' sons. McIlhany placed both on probation, and the record shows no evidence of any proceedings after July 25.

On October 5, 1983, Adams was served with an order signed by McIlhany. The order directed her to appear in court on October 7 to show cause why she should not be held in contempt of court for stating in her letter of June 14 that McIlhany was "paid off by defendants."

When Adams appeared in court on October 7, without an attorney, McIlhany told her that it was her opportunity to present her defense. Adams was sworn in and explained that she had only meant to say that she could not afford to hire a lawyer. She added that she had not intended to make any accusations

against McIlhany. He indicated that he did not accept her explanation, found her in contempt and sentenced her to serve thirty days in jail and to pay court costs. At no time did McIlhany inform Adams of any rights she might have or make any attempt to explain the nature of the proceedings. Adams served twenty-eight days in jail.

After Adams filed suit, McIlhany moved on March 16, 1984, to dismiss the complaint on the ground of absolute judicial immunity. The district court construed this as a motion for summary judgment and gave the parties until April 5 to submit whatever material they wished. On Adams' motion, the court extended the deadline to April 16. On April 16, Adams filed her response, requesting that the court either deny McIlhany's motion or hold it in abeyance until she could conduct further discovery. On July 2, Adams filed two notices of depositions, one being to take

McIlhany's deposition. McIlhany then moved to stay discovery, and the court granted the motion. On September 7, the district court, 593 F.Supp. 1025, granted the motion for summary judgment and dismissed the case. Adams filed a timely notice of appeal.

III.

Because we find no genuine issue of material fact which would support a finding that Judge McIlhany harmed Adams through acts other than judicial acts not performed in the clear absence of all jurisdiction, liability is prohibited by McIlhany's absolute judicial immunity. Accordingly, we affirm the district court's grant of summary judgment for McIlhany on the damages issue.

A

Absolute judicial immunity extends to all judicial acts which are not performed in the clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55

L.Ed.2d 331 (1978). There is no question that those of Judge McIlhany's acts complained of here were "judicial acts" for immunity purposes. "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act, itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." Stump, 98 S.Ct. at 1107. Here, Adams' complaint concerns the issuance of a "show cause" order directing her to appear in court and the order directing her to be imprisoned for thirty days. Both of these acts are acts normally performed by a judge. Moreover, there is no question that in answering the "show cause" order and in her appearance before the court, Adams "dealt with the judge in his judicial capacity." That McIlhany may have been wholly motivated

by personal malice does not in the least turn a judicial act into a nonjudicial act. Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872); Stump, supra.

The four factors generally relied upon by this circuit in determining whether an act is "judicial" also support this characterization of Judge McIlhany's actions; these are: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity. McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972). The four-part McAlester test should always be considered in determining whether an act is "judicial"; however, the test factors should

be broadly construed in favor of immunity,[1] and it should be born in mind that while the McAlester factors will often plainly indicate that immunity is available, there are situations in which immunity must be afforded even though one or more of the McAlester factors fails to obtain.[2] Nor are the factors to be given equal weight in all cases; rather, they should be construed in each case generously to the holder of the immunity and in the light of the policies

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[1]Accordingly, exceptions to judicial immunity based on narrow factual considerations, or technical or fine distinctions, must be avoided and those which exist should be as narrowly construed as reasonably possible.

[2]Where, for example, a judge cites a person raising a disturbance immediately outside a courtroom window for contempt, judicial immunity is plainly available although factors (2), (3) and (4) might not apply. Such contempt citations are both authorized by express act of Congress, and are also inherent in the power of a court.

underlying judicial immunity. Of primary importance among these policies is the need for independent and disinterested judicial decision-making; immunity should not be denied where the denial carries the potential of raising more than a frivolous concern in the mind of some future judge that to take proper action might expose him to personal liability. Stump, for example, extended immunity to an Indiana judge who authorized the sterilization of a young woman at her mother's request. Stump made it clear that the act of granting such a petition would have been a "judicial act" even if no other Indiana judge had ever considered a sterilization petition; the petition bore sufficient similarity to other petitions -- such as a petition to permit a minor to enter into a binding contract -- that a colorable legal argument might be based on an analogy with the sterilization petition at some time

in the future. Stump, 98 S.Ct. at 1107, n. 11. A future judge perceiving this possibility might be deterred by a potential suit or liability; such a possible distortion of the judicial decision- making process has been uniformly held to be unacceptable, especially when the availability of alternative remedies, such as appeal and impeachment, are included in the balance.[3]

With the above considerations in mind we turn to the McAlester factors. First, the issuance of a "show cause" order and citing for contempt are acts normally performed by a judge. Second, these acts are not alleged to have been performed in inappropriate places; Adams was ordered to come to court and she

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[3]We express no opinion as to whether the availability of those alternative state remedies might alone bar the action under Hudson v. Palmer, ___ U.S. ___, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

was sentenced in the courtroom. Third, the controversy in this case arose out of the criminal trial of Adams' sons, over which McIlhany presided. That the judge waited months to respond to the controversy was clearly a serious procedural error, but "[a] judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." Stump, 98 S.Ct. at 1106. Fourth, although there is no single "confrontation" out of which the present dispute arose; the most closely analogous event in this case was Adams' appearance before the court at which she was sentenced. This "visit" was plainly "to the judge in his official capacity"; that Adams was ordered to make her appearance does not distinguish this case from any case involving a subpoenaed witness or a case in which a person appears pursuant to an arrest warrant. It might also

be argued that Adams' letter to McIlhany is the proper analogue to the McAlester "visit"; but this letter was also directed to McIlhany in his official capacity. Construed in accordance with their underlying policy, all four McAlester factors indicate that the actions complained of in this case were "judicial acts" for the purpose of immunity analysis.[4]

B

McIlhany also had sufficient "jurisdiction," as that term is used in judicial immunity analyses, for his immunity

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[4]Our decision in Harper v. Merckle, 638 F.2d 848 (5th Cir. 1981) is not to the contrary. That case restricted its holding denying immunity to the "exceedingly narrow and ... rarest of factual settings." Harper at 859. Accordingly, that case, by its own terms, is virtually without precedential value. In addition, we note that Harper's reliance on the "motives" of the judge is inconsistent with McAlester, Bradley, Stump, and Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

to attach. Where a court has some subject-matter jurisdiction, there is sufficient jurisdiction for immunity purposes. Bradley, 13 Wall. at 352. Judge McIlhany's was a court of general jurisdiction empowered to punish for contempt. To deny the existence of "jurisdiction" in this case would raise the possibility that future cases might turn on the rather rarified question of whether a judge had cited for contempt and delayed sentence, or merely, as here, delayed both citation and sentence. It is certainly a valid exercise of judicial power for a judge to cite for contempt but leave the determination of sentence for a later time. If Adams had been cited for contempt for presenting her letters to the judge in the courtroom, or causing them to be delivered during her sons' trial, and imposition of her sentence had been delayed, there would be no question that judicial immunity would attach.

We decline to create a potential ambiguity whose threat to disinterested decision-making is not obviously frivolous.

Adams points out that Texas courts are not empowered to punish summarily for "constructive" contempts such as the letters around which this case revolves. Adams draws our attention to longstanding Texas precedent prohibiting a Texas judge from citing an out-of-court contemnor as McIlhany did in this case. See, e.g., Ex Parte Ratliff, 117 Tex. 325, 3 S.W.2d 406, 407 (1928). In addition, summary punishment for a constructive contempt is unconstitutional. Sandstrom v. Butterworth, 738 F.2d 1200 (11th Cir. 1984). However, we are to construe a court's jurisdiction broadly when immunity is the issue. Stump, 98 S.Ct. at 1005. For the purposes of defining "jurisdiction" in this section 1983 immunity case, it is sufficient that McIlhany's court was a court of general

jurisdiction empowered to cite for contempt, and that to deny immunity in the present case might create an ambiguity in the law which would pose more than a frivolous threat to disinterested judicial decision-making.

IV.

In addition to damages, Adams also seeks injunctive and declaratory relief. The district court dismissed these claims for failure to make out a constitutionally required "case or controversy."[5]

A

The district court did not err in denying the availability of injunctive relief in this case; there is simply no case or controversy as required by Article III of the

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[5]Judicial immunity does not bar actions for prospective injunctive relief under section 1983. Pulliam v. Allen, ___ U.S. ___, 104 S.Ct. 1970, 1981, 80 L.Ed.2d 565 (1984).

Constitution in which a federal court may grant injunctive relief. Adams, "having been released from jail, no longer ha[s] a live controversy as to either the contempt citation or the...period[] of incarceration which would entitle ... [her] to injunctive relief." Juidice v. Vail, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977). Adams lacks standing to pursue injunctive relief in federal court; accordingly, we affirm the dismissal of her claim for injunctive relief.

B

Nor did the district court err in dismissing the claim for declaratory relief:

> "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field. United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947). "The difference between an abstract question and a

> 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 959-960, 22 L.Ed.2d 113 (1969) (emphasis supplied).

The fact that it is most unlikely that Adams will again come into conflict with Judge McIlhany in circumstances similar to the ones presented here, and with the same results, precludes a finding that there was "sufficient immediacy and reality here to warrant an action for declaratory relief." Id. 89 S.Ct. at 960.

V.

In this case we have determined that Adams' claim for damages is precluded by the doctrine of absolute judicial immunity. In addition, her claims for injunctive and declaratory relief must be disallowed for failure to present a sufficient "case or controversy" under Article III. Accordingly, we affirm the district court's dismissal of this entire action.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

DORIS ADAMS,	§	
	§	
PLAINTIFF,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	CA-2-84-31
GRAINGER W. McILHANY, Individually and as Presiding Judge of the 31st Judicial District of Texas,	§	
	§	
DEFENDANT.	§	

ORDER

Plaintiff brings an action for damages and equitable relief claiming that her constitutional rights were denied her in violation of 42 U.S.C. § 1983 when she was jailed pursuant to a wrongful order of contempt issued by Defendant Judge McIlhany.

Defendant responds by making a Motion to Dismiss (now being treated as a Motion for Summary Judgment), claiming that Plaintiff

has failed to state a claim upon which relief can be granted.

UNDISPUTED FACTS

The following facts are undisputed:

(1) Plaintiff resides in Miami, Texas. Miami, Texas, is located in Roberts County, Texas.

(2) Defendant presides over the 31st Judicial District of Texas. The 31st Judicial District comprises Gray, Hemphill, Lipscomb, Roberts, and Wheeler Counties, Texas.

(3) Plaintiff is about 51 years old and has at least three sons including David Shannon Adams, Jack Glen Adams, and Paul Scott Weeks.

(4) During the months of May and June of 1983, the above three of Plaintiff's sons were in trouble with the law and had criminal cases pending before the Defendant.

(5) During the months of May and June

of 1983, the parties exchanged the following correspondence:

1. The Plaintiff sent a letter dated May 23, 1983, to Judge McIlhany concerning the legal problems of Glen Adams and Paul Weeks.

2. The Plaintiff sent a second letter dated June 8, 1983, to Defendant concerning the general state of "the law" in Miami.

3. - On or about June 10, 1983, Defendant sent the following letter to Plaintiff:

Dear Mrs. Adams;

I received your letters regarding your sons.

I regret that they have not seen fit to reform to society.

Sincerely yours,
Grainger W. McIlhany

4. Shortly after receiving the Defendant's letter, Plaintiff responded on or about June 14, 1983, by adding her own comments to the bottom and back of Defendant's letter and returning it to him. The letter reads as follows:

Judge McIlhany

I regret too inform you that my

children have been Rail Road by this law in Miami. There is plenty of people in this town who knows what is really going on but who can fight City Hall. I haven't got but one thing too say. You had better open up your eyes & search your own heart and see what is really going on, in this town, The law stinks & stinks bad. My boys are boys, not men. There behavery is as a boy - they have too learn too!! I have seen plenty of grown people act worse & that is the law down here trying to ruin 3 of my childrens lives & they are doing a good job. Shannon did not rape Angie Bean. Eddie as far as I'm concerned planed through prints from the jail after he arrest him. He is a wicked man & so is Lando Brown. I hope all of you pay if you don't stop doing my children this way.

<u>You will too</u>, <u>in God's way</u>. The only way you can win with the law any more is if you can buy your way out & its done every day. You know I can't pay so you stick my boys good. Harold Comer is the only one I have seen do my kids right.

Doris Adams

(6) The matters regarding Paul Scott Weeks and David Shannon Adams were still before the Defendant's Court when Plaintiff wrote her June 14, 1983 letter.

(7) All three letters to Defendant were private correspondence. None were ever filed or published.

(8) Plaintiff did not send any communications to Defendant after June 14, 1983.

(9) On October 5, 1983, Plaintiff received an order from Defendant to appear before him on October 7, 1983 (two days from the date of the order).

(10) Plaintiff had never been before Defendant in any proceeding or matter prior to October 7, 1983. [C-13]

(11) Plaintiff appeared before Defendant on October 7, 1983. Plaintiff did not have an attorney present. Plaintiff was not told that she had a right to an attorney and no inquiry was made regarding whether she could afford an attorney so that one might be appointed for her, nor was Plaintiff advised of any rights she may have had at the time of

the hearing.

(12) The contempt proceeding involved the June 14, 1983, communication with Defendant, specifically, the language stating, "the only way you can win with the law any more is if you can buy your way out and its done every day. You know I can't, so you stick my boys good."

(13) On October 7, 1983, after the hearing, Defendant found Plaintiff in contempt and ordered her sentenced for a period of 30 days in jail and to pay costs of court.

(14) The Plaintiff was thereafter placed in confinement for a period of twenty-eight (28) days.

CLASSIFICATION OF CONTEMPT

In the State of Texas, contempts of court are labeled as criminal or civil, and as direct or constructive. Because these labels are misapplied in some portions of the

pleadings and briefs which have been submitted, some discussion on the classification of contempt may be helpful.

Distinguishing criminal from civil:

> Criminal contempt - where the primary purpose of the proceeding is to vindicate public authority (e.g., to punish acts done in disrespect of the court or its process, or which obstruct the administration of justice), the proceeding is usually denominated criminal. The action is punitive in nature. Ex Parte Hosken, 480 S.W.2d 18, 23 (Tex.Civ.App. -- Beaumont 1972).
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> Civil contempt - defined as those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for their benefit. The purpose of civil contempt is remedial and coercive in nature. 13 Tex. Jur.3rd CONTEMPT § 3.

The key to distinguishing constructive and direct contempts is whether the act was committed "in the presence of the court".

> Direct contempt - words spoken or acts done in the presence of the court or in open court.
>
> Constructive contempt - (or

indirect contempts) those acts which occur outside the presence or hearing of the court.

Thus, this latter classification goes to where the acts took place rather than the nature of those acts, as in the former distinction.

The important classification for the case at bar is the direct vs. constructive one because the contemnor's rights are substantially different under the two. While direct contempt can be dealt with immediately without procedural safeguards for the contemnor, constructive contempt may not be punished summarily. The contemnor has the common due process rights in the latter case.

The alleged contempt in this cause should be classified as constructive criminal contempt because Judge McIlhany sought to punish the Plaintiff for acts outside the presence of the court. The case of Cooke v. The United States, 45 S.Ct. 390 (1925),

provides authority for the constructive contempt classification. There the Court considered a fact situation similar to the one in the case at bar in that the contemnor in Cooke was accused of delivering an insulting letter to a judge while his court was in a short recess. The Court found his act to be one not in open court and that proceedings based upon such an act were subject to due process requirements. Id. at 394-15. The Cooke court went on to include within the due process rights of the constructive contemnor, the right to reasonable notice, assistance of counsel, and trial before an unbiased judge, if possible, especially where the contempt charged has an element of personal criticism or attack upon the judge. As to the latter element, the Court later stated in Johnson v. Mississippi, 91 S.Ct. 1778, 1780 (1971), that trial before an unbiased judge is essential to due

process. See also Mayberry vs. Pennsylvania, 91 S.Ct. 409, 505 (1971).

All three of the above elements of due process are arguably violated in the present case given the Plaintiff's allegations and notwithstanding Defendant's unsupported claim within the Statement of Facts portion to his Brief in Support of Motion to Dismiss that the Plaintiff discussed the matter with an attorney of her choosing and thereafter decided not to retain counsel.

However, that Defendant's major contention in his Motion to Dismiss is not that the alleged due process violations did not occur, but rather, that the Judge has absolute judicial immunity for his actions regardless of due process violations. This view is supported by the recent Supreme Court decision in Stump v. Sparkman, 98 S.Ct. 1099 (1978), where the Court reiterated the idea that violations of due process do not defeat

judicial immunity. "A judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors." (Id. at 1106). Therefore, the most important consideration to undertake at this point is the scope of the doctrine of judicial immunity.

JUDICIAL IMMUNITY TO CLAIMS FOR DAMAGES.

The seminal case regarding the scope of judicial immunity as to a suit in damages under 42 U.S.C. § 1983 is Stump v. Sparkman, supra. Generally speaking, Stump holds that judges are immune from liability for their judicial acts so long as those acts are not done in a clear absence of jurisdiction.

Question of Jurisdiction.

The district court of Texas is one of general jurisdiction. Tex. Rev. Stat. Ann. Art. 1909. Within that jurisdiction is the power to punish for contempt. Tex. Rev.

Stat. Ann. Art. 1911(a) § 1.

In analyzing this jurisdiction, consideration should be given to the words of the Court in Stump.

> The scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction. Citing Bradley v. Fisher, 13 Wall 335, 351 (1872).

Giving the proper effect to the above passage leads to the conclusion that the acts of Judge McIlhany were within his jurisdiction, or at least, not in a clear absence of jurisdiction. The Defendant, by virtue of his position as district judge, has been given by statute the contempt power to maintain the authority and dignity of the court. Although the propriety of his use of that power is subject to question, such is

not sufficient to establish a clear absence of jurisdiction.

To help in understanding what might constitute a clear absence of jurisdiction, reference can be made once again to Stump.

> In Bradley, the Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. (Id. at 1105, n.7)

The present cause falls closer to the latter example than it does to the former.

Judicial Act

Although the concepts of "judicial acts" and "judicial jurisdiction" are somewhat intertwined, many courts have analyzed the problem with this two-step approach and ask,

(1) whether the Judge's actions were judicial acts AND

(2) whether or not they fall clearly outside his jurisdiction. Harper v. Merckel, 638 F.2d 848, 858 (5th Cir. 1981).

We move on, therefore, to the question of "judicial act".

In determining whether a particular act is judicial, the Fifth Circuit has adopted the language of Stump indicating that two factors must be considered,

(1) whether it is a function normally performed by a judge, and

(2) whether (the parties) dealt with the judge in his judicial capacity. Arsenaux v. Roberts, 726 F.2d 1022, 1023 (5th Cir. 1982).

In applying this test to the present facts, the Plaintiff urges the Court to follow the reasoning of Harper v. Merckle, supra. In that case, a § 1983 action was permitted against a judge who had ordered the plaintiff incarcerated for contempt. The judge acted on the mistaken belief that there

was a pre-existing contempt order pending against the plaintiff. The judge took it upon himself to have the plaintiff arrested and subjected to an immediate contempt hearing when, in the course of a casual conversation with the judge, the plaintiff refused to be sworn. In fact, the plaintiff had come to the courthouse only for the purpose of delivering a support payment to his ex-wife, an employee of another judge in the courthouse. The court in Harper found that the plaintiff did not visit the judge in his official capacity and thus, the judge's action did not meet the "judicial act" requirement for the application of absolute judicial immunity.

Conceding that the Defendant's use of the contempt power is a normal judicial function, the Plaintiff in the present cause would have this court find that her contacts with Judge McIlhany were, like those in

Harper, outside of his judicial capacity. In weighing this proposed course of action, this court gives heed to the warning of the Harper court.

> But we caution that our holding is exceedingly narrow and is tailored to this, the rarest of factual settings. Succinctly stated, we hold only that when it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears certain that no party has invoked the judicial machinery for any purpose at all, then the judge's actions do not amount to judicial acts (and) ... are not cloaked with judicial immunity from suit under § 1983. (supra at 859).

The present case does not seem to fit within the Harper Court's narrow application. As the Defendant's brief points out, Mrs. Adams letters were addressed to him as a judge, she discussed the facts of cases then pending before him as judge, and she clearly knew she was dealing with him in his judicial capacity when she was summoned to appear

before him in the October contempt proceeding. The reasonable conclusion to be drawn from these undisputed facts is that Doris Adams indeed "invoked the judicial machinery for (some) purpose", and that Judge McIlhany's actions were "judicial acts" which should be afforded the benefit of absolute judicial immunity.

The Plaintiff has called upon this court to delay deciding this motion until the Plaintiff can depose the Defendant "to determine on what basis the Defendant purportedly acted" and to discover how the Defendant's actions were characterized by the State Commission on Judicial Conduct.

However, the Court has determined that the controlling facts are not in dispute so that a delay in the rendition of its decision would serve no useful purpose. First of all, the characterization of Judge McIlhany's conduct by the State Commission on Judicial

Conduct is not binding on this court nor is it in any way determinative of what constitutes a "judicial act" or what falls within Judge McIlhany's "jurisdiction". Furthermore, the Commission's proceedings are confidential, both constitutionally [Art. 5 § 1-a(10)] and legislatively [Art. 5966(a)(8)(A)] until such time as the Commission decides to bring formal action against a judge. The Commission has not done so here.

As has already been noted, the Plaintiff also seeks additional time to discover upon what basis the judge acted. However, as previously stated, such considerations will not serve to defeat judicial immunity. As the Court in Stump pointed out, even if the judge had acted in error or maliciously, his immunity would remain intact so long as he did not act clearly outside his jurisdiction. This court has already determined that the

judge did not act clearly outside his jurisdiction.

The Harper court suggests that motive is a consideration in defining judicial acts. However, personal motivation is only one part of the conjunctive Harper test, the other being whether the party has "invoked the judicial machinery for any purpose at all." Harper at 859. Again, it is clear from the undisputed facts that the Plaintiff in this case invoked the judicial machinery in writing her letters to the judge. Therefore, the fact that Judge McIlhany arguably acted out of personal motivation is insufficient to remove his actions from the protected sphere of judicial acts.

Section 1983 and Judicial Immunity.

The question arises as to whether Section 1983 changes the status of the doctrine of judicial immunity. This question was answered definitively by the Supreme

Court in the case of Pierson v. Ray, 87 S.Ct. 1213 (1967).

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities.... The immunity of judges for acts within the judicial role is ... well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine. (Id. at 1218)

Thus, the "every person" referred to in § 1983 means "every person except judges." Harper, supra at 856.

Therefore, the Defendant may successfully claim the doctrine of absolute judicial immunity to the suit in damages under § 1983 despite the highly questionable nature of his actions.

> Disagreement with the action taken by the judge, however, does not justify depriving that judge of his immunity. Despite the unfairness to litigants that sometimes

> results, the doctrine of judicial immunity is thought to be in the best interests of the proper administration of justice. Stump, supra at 1108.

JUDICIAL IMMUNITY TO EQUITABLE RELIEF

The Plaintiff in this cause also seeks injunctive and declaratory relief under § 1983 and cites the Court to Pulliam v. Allen, 53 U.S.L.W. 4526 (May 18, 1984) in support thereof. In Pulliam, a case wherein the defendant-judge allegedly made a practice of jailing persons unable to make bond for nonjailable misdemeanors, the Court addresses for the first time whether a judge's absolute judicial immunity shelters him from prospective injunctive relief.

The Pulliam Court concluded that common law judicial immunity did not bar such relief. The Court states:

> nothing in the legislative history of § 1983 or in the Courts' subsequent interpretations supports a conclusion that Congress intended to insulate judges from prospective collateral injunctive relief.

Pulliam at 4530.

After reviewing the underlying purpose of enacting the § 1983 legislation, the court again declared:

> we remain steadfast in our conclusion that Congress intended § 1983 to be an independent protection for federal rights and find nothing to suggest that Congress intended to expand the common law doctrine of judicial immunity to insulate state judges completely from federal collateral review. Id. at 4531.

Finally, the court states once again,

> We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity. Id. at 4531.

As to the related subject of the award of attorney's fees in a § 1983 case pursuant to § 1988, the Court found that Congress intended that such awards be available "even when damages would be barred or limited by immunity doctrines or special defenses, available only to public officials." Pulliam at 4531. Thus, judicial immunity does not

bar the award of attorney's fees under § 1988 when prospective relief is properly awarded in the enforcement of a § 1983 claim.

Nevertheless, it should be noted that the Pulliam Court did not consider whether the injunctive relief awarded in that case was appropriate since the issue was not before the court on appeal. However, the Court did briefly discuss the fact that there were limitations on the availability of equitable relief.

> The limitations already imposed by the requirements for obtaining equitable relief against any defendant - a showing of an inadequate remedy at law and of a serious risk of irreparable harm, severely curtail the risk that judges will be harassed and their independence compromised. Pulliam at 4530.

In Siavin v. Curry, 574 F.2d 1256 (5th Cir. 1978), the Fifth Circuit in consideration of a § 1983 action against a judge, noted that "courts will grant declaratory relief only if there is a substantial controversy of

sufficient immediacy and reality between parties having adverse legal interests" and that determination depends upon the plaintiff's current condition. Id. at 1264.

Doris Adams has been released from confinement and is no longer under any apparent threat of immediate harm. In Juidice v. Vail, 97 S.Ct. 1211 (1977), the Supreme Court considered the standing of appellees, the context of the case or controversy requirement of Art. III, to seek injunctive relief in the District Court from imprisonment pursuant to an order of contempt. There the Court held that certain named appellees "having been released from jail, no longer had a live controversy ... as to either the contempt citation or the short periods of incarceration which would entitle them to injunctive relief." Id. at 1215-6. The reasoning of Juidice would be applicable in the present case, defeating the

plaintiff's claim for equitable relief despite the lack of apparent legal remedies available to redress the wrongs done.

Another factor which weighs in favor of granting the Defendant's Motion to Dismiss as to the equitable relief sought by the Plaintiff, is the difficulty in this case of fashioning appropriate relief without infringing upon the proper exercise of the contempt power in the future. Whether a particular defendant has or has not committed contempt of court is a question normally and necessarily left to the discretion of the presiding judge. To place the State Court Judge under the watchful eye of the federal district court and the ever present threat of contempt might deter even the most courageous judge from exercising this discretion independently and free from intimidation.

The problem is more acute in the present case than under the Pulliam facts. Whereas

the Pulliam Court was dealing with a routine and defined practice of the judge in question, here the Court is faced with allegations that a judge acted injudiciously under a particular set of facts. Under these circumstances, the requested equitable relief would require a vague and open-ended prohibition of the judge's acting to violate a contemnor's rights in the future under the threat of being held in contempt of this Court. To do so would greatly increase the potential for harassing litigation and the corresponding intimidation of the judge in performance of his judicial duties in the future, and therefore, is inappropriate at this time.

CONCLUSION

In conclusion, the Defendant in this cause is judicially immune from a suit in damages under the facts of this case. Further, since the Plaintiff is no longer

incarcerated nor under apparent threat of future harm, there is no longer a live controversy to which the application of equitable relief would be appropriate. There being no genuine issue of material fact, the Court finds that as a matter of law, the Defendant should be granted summary judgment.

It is so ORDERED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

DORIS ADAMS,	§	
	§	
PLAINTIFF,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	CA-2-84-31
GRAINGER W. MCILHANY, Individually and as Presiding Judge of the 31st Judicial District of Texas,	§	
	§	
DEFENDANT.	§	

JUDGMENT

The Court has this day entered an Order granting Defendant's Motion for Summary Judgment in the above cause.

It is therefore ORDERED, ADJUDGED, and DECREED that Defendant's Motion for Summary Judgment is granted, dismissing this cause on the merits, and all costs in the above cause are taxed against Plaintiff.

ENTERED this 7th day of September, 1984.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1827

D.C. Docket No. CA-2-84-0031

DORIS ADAMS,

Plaintiff-Appellant,

versus

GRAINGER W. McILHANY, Individually and as Presiding Judge of the 31st Judicial District of Texas,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN, POLITZ, and JOLLY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-

appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

June 27, 1985

ISSUED AS TO MANDATE:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-1827

DORIS ADAMS,

Plaintiff-Appellant,

versus

GRAINGER W. McILHANY, Individually and as Presiding Judge of the 31st Judicial District of Texas,

Defendant-Appellee.

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Appeal from the United States District Court for the Northern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion 06/27/85, 5 Cir., 198__, ___ F.2d ___)

(August 2, 1985)

Before BROWN, POLITZ, and JOLLY, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc

as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.